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JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 153

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON ET AL.,
Appellants,

vs.

CITY OF MIAMI, A MUNICIPAL CORPORATION,
Appellee.

Appeal from the Supreme Court of the State of Florida

PETITION FOR REHEARING

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The Court, in ordering the dismissal of these appeals upon the ground that the appellants had failed properly to raise a substantial federal question, overlooked or failed to consider the following, severally:

THE FEDERAL QUESTION WAS TIMELY RAISED BY PETITION FOR REHEARING IN THE STATE SUPREME COURT.

This Court has held that the raising of a federal question is timely if raised at the first opportune time,

even if it be upon petition for rehearing in the State Court where the decree, favorable to the appellants up to that point, was reversed in the State Supreme Court.

Saunders v. *Shaw*, 244 U. S. 317.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673.

State of Missouri ex rel. Missouri Ins. Co. v. *Gehner, Assessor*, 281 U. S. 313.

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 156.

The appellants' Petition for Rehearing in the State Court averred (R 65):

> "4. In holding the notice of the confirmation of the assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV U. S. Const. must be complied with. In the case of residents, constructive notice, as attempted, is violative of the rights secured by such amendment.
>
> *Walker* v. *City of Hutchinson*, 77 S. Ct. 200; *Mullane* v. *Central Hanover Bank & Trust Co. et al.*, 339 U. S. 306."

This was presented as one of the questions to this Court in the Notice of Appeal (R 75).

This point was commented on by Mr. Justice Stewart, who observed, in the course of oral argument, that the first occasion upon which there was need for appellants to have raised the federal question, was when the Supreme Court of Florida, on the City's Petition for Rehearing, reversed itself, as well as the decree of the Circuit Court.

THE COURT WAS OBLIGATED TO TREAT THE APPEAL AS A PETITION FOR CERTIORARI.

28 U.S.C.A. 2103 provides in part as follows:

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. * * * "

In *Hanson* v. *Denckla,* (1958) 357 U. S. 235, this Court, on an appeal from the Supreme Court of Florida, just as here, postponed until a hearing on the merits the question of jurisdiction. Upon a hearing on the merits this Court dismissed the appeal for want of jurisdiction, but treated the appeal as a certiorari granted, saying:

" * * * Accordingly, we are without jurisdiction of the appeal and it must be dismissed. *Wilson* v. *Cook,* 327 U. S. 474, 482, 66 S. Ct. 663, 667, 90 L. Ed. 793; *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson,* 324 U.S. 182, 65 S. Ct. 624, 89 L. Ed. 857. Treating the papers whereon appeal was taken as a petition for certiorari, 28 U.S.C. § 2103, 28 U.S.C.A. § 2103, certiorari is granted."

The footnote to the above case reads as follows:

"The record discloses no mention of the state statute *until the petition for rehearing in the Florida Supreme Court.* In the trial court, appellant's motion to dismiss raised the federal question in this manner: 'The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section 1 of the Fourteenth

Amendment to the United States Constitution.' No. 107, R. 41." (Emphasis supplied)

The Amended Complaint raised the federal question in the trial court, alleging (R 6):

"The special assessment liens sought to be imposed upon the abutting property owners in Highway Improvement District H-477 *are illegal and void and constitute taking of property in violation of the Constitution of the United States* and of the State of Florida, upon the following grounds: * * * " (Emphasis supplied)

See also: *Knapp* v. *Schweitzer,* 355 U. S. 804.

This appeal should be treated as a certiorari under Section 2103 because the decision of the Supreme Court of Florida is directly contrary to this Court's recent decision in *Wisconsin Electric Power Company* v. *City of Milwaukee,* 352 U. S. 948, 274 Wis. 121, 81 N. W. (2) 298, which is squarely in point. The State Court decision is also contrary to *Mullane* v. *Central Hanover Bank & Trust Company,* 339 U. S. 306; *Walker* v. *City of Hutchinson,* 352 U. S. 112; *New York* v. *New York, N. H. & H. R. Co.,* 344 U. S. 293; and *Lambert* v. *California,* 355 U. S. 225.

THE SUPREME COURT OF FLORIDA NECESSARILY PASSED UPON THE FEDERAL CONSTITUTIONAL QUESTIONS RAISED BY THE PETITION FOR REHEARING.

The majority opinion of the Supreme Court of Florida on rehearing granted was predicated upon a single proposition, viz: that the property owners were estopped to challenge the assessments because they failed to file their suit within twenty (20) days of the confirmation of the assessment roll (R 51).

In the opinion of the Supreme Court of Florida, written by Thomas, J., which thereafter became the minority opinion, he said (R 33):

"So to generate the power vested by the statute, the resolution must be adopted, and to secure due process to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given."

Justice Thornal wrote a specially concurring opinion in which he said that he would affirm the lower Court decree upon the ground that the record abundantly supported the Chancellor's finding of a complete lack of special benefit to the abutting property owners. The City of Miami, in its Petition for Rehearing, directed a specific ground to Justice Thornal. The City said (R 43):

"In this connection, Justice Thornal overlooked or failed to consider that if, in making special assessments, due notice was accorded the property owners by the City of Miami as required by the Charter as held in the opinion of Justice Thomas, then in that event all provisions of organic law that pertain to due process were complied with. * * *"

Quite significantly it was Justice Thornal who voted to grant the City's Petition for Rehearing, resulting in the decision complained of. The majority of the Court on rehearing, joined by Justice Thornal, said (R 51):

"* * * In *Escott* v. *City of Miami,* 144 So. 397 (Fla. 1932), in speaking of this identical section of the city charter, after holding the original notice to have been validly given, we said:

'If the property owner had notice, and in this case we have held that he did have, his *only* method of questioning any error or irregularity in the proceedings was by filing objections before the city commission, and, if overruled there, by filing his special appeal to the Circuit Court, in the manner provided by the charter.'

" 'Where a property owner has an opportunity given him, under a statute providing for special assessments for local improvements, to appear

> and contest the question before the local authorities whose duty it is (fol. 54) to pass upon objections, *their determination on the subject of benefits is final, and, if he fails to avail himself of the opportunity provided by the statute, he thereby admits the finality of the determination, and is estopped to raise the question in subsequent proceedings, such as by suit in equity to enjoin the enforcement of assessments which have become conclusive under the statute'.*" (Emphasis supplied)

In order to have the principles of estoppel operate notice is an essential element. How could the property owners be estopped because they failed to file suit within 20 days if they had no notice as to when the 20 day limitation period was tolled, or notice that special assessments were going to be levied against their properties? The Court necessarily determined that the notice by publication was legally sufficient under the Fourteenth Amendment, otherwise it could not have predicated its opinion upon estoppel.

This Court has repeatedly held that even though the opinion of highest State Court does not expressly recite or evidence consideration of a federal question, jurisdiction will be entertained where the decision in the State Court necessarily required it to have passed upon the federal question.

> *Wilson* v. *The Black Bird Creek Marsh Company*, 2 Pet. 245, 250.
>
> *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 579.
> *Eureka Lake & Yuba Coal Co.* v. *Superior Court*, 116 U. S. 410.

If it were otherwise, the State Courts could simply refusing to recognize the problem, or by "dodging" the issue regulate and determine this Court's jurisdiction.

See: *McCullough* v. *Commonwealth of Virginia*, 172 U. S. 102, 117.

THE CHARTER REQUIREMENT THAT PROPERTY OWNERS FILE SUIT WITHIN TWENTY DAYS OF CONFIRMATION OF THE ASSESSMENT ROLL VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT UNITED STATES CONSTITUTION.

That Petition for Rehearing also alleged that the time allowed by the City Charter was so short as to violate the Due Process Clause of the Fourteenth Amendment to the Federal Constitution (R 64):

> "2. In holding that the property owners were estopped to attack the assessments for want of benefits, because they did not file their action in the Circuit Court within the time fixed by the Charter (10 or 20 days), the Court overlooked the fact that the property owners never had notice of the (fol. 68) confirmation of the assessment roll, and therefore had no notice of when the time for following the statutory procedure began to run. Such lack of notice is violative of procedural due process. Amd. XIV U. S. Const."

This question was likewise presented to this Court by the Notice of Appeal (R 76).

The Petition for Rehearing averred that the Charter requirement that the property owners file suit within twenty (20) days of confirmation of the assessment roll violated the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. This is particularly true where the property owners had *no notice as to when the time began to run against them.*

A similar twenty day provision in an analogous case was held to be unconstitutional by the Supreme Court of Minnesota in *Minnesota Electric Short Line Terminal Co.* v. *City of Minneapolis,* 64 N. W. (2) 149.

For the reasons stated the cause should be reheard and the judgment of the Supreme Court of Florida reversed.

Respectfully submitted,

_____

Clyde Epperson,

_____

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_____

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CERTIFICATE OF GOOD FAITH AND SERVICE

I, Thomas H. Anderson, one of the attorneys for the appellants herein, and a member of the Bar of the Supreme Court of the United States, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay. I further certify that on the ..... day of ....., 1959, I served a copy of the foregoing Petition for Rehearing on the City of Miami by mailing a copy in a duly addressed envelope with

sufficient postage prepaid to carry the said Petition to Milton M. Ferrell, the City Attorney for the City of Miami, Five Fifty Building, 550 Brickell Avenue, Miami 32, Florida.

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